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92-346

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

SERAFIN CASTILLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

FREDERICK F. COHN
205 W. Wacker Drive
Chicago, Illinois 60606
(312) 641-0692
Attorney for Petitioner

(1a) QUESTIONS PRESENTED

Can a procedural rule (F.R.Cr.P. 33), setting a 7-day time-limit for motions for new trial (not based on newly-discovered evidence), operate to deprive defendant of his Sixth Amendment constitutional right to effective assistance of counsel at trial, at post-trial motions, and on appeal, and his Fifth Amendment constitutional right to due process of law, where defendant's first motion for new trial (filed by original trial counsel) had not yet been acted on, and defendant had not yet been sentenced, when substitute counsel, after the 7-day period, filed a second motion for new trial, appropriately alleging ineffective assistance both by trial and original post-trial counsel?

(1b) PARTIES INVOLVED [per Rule 21.1(b)]

Petitioner, Serafin Castillo, was the defendant in the United States District Court for the Northern District of Illinois, Eastern Division, and appellant in the United States Court of Appeals for the Seventh Circuit.

Respondent, United States of America, was the plaintiff in the District Court, and appellee in the Court of Appeals.

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1. Defendant's constitutional right to effective assistance of counsel, Amendment VI, Constitution of the United States, has supremecy over a rule of procedure, 18 U.S.C. F.R.Cr.P. Sec. 33, so that where a defendant files a second motion for new trial--prior to the court's acting on the original motion and/or upon sentencing the defendant--and the new

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motion is by new counsel who asserts that prior counsel (both trial counsel and counsel in the original motion for new trial) rendered ineffective assistance because he did not raise the issue of his own ineffectiveness, the trial court, in order to preserve the defendant's constitutional right to effective assistance of counsel and in the interests of judicial economy, should hear evidence on that issue, even though the second motion for new trial was filed past the seven day limitation period set out in Rule 33. 9

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(1d) Judgment Below

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No.

SERAFIN CASTILLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Serafin Castillo, (hereafter, petitioner, or defendant), prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit, affirming the judgment (conviction and

sentence) of the United States District Court for the Northern District of Illinois, Eastern Division.

Defendant was convicted of conspiracy to commit extortion, in violation of 18 U.S.C. Sec. 1951, and sentenced to four months in prison.

Judgment, Opinion and Orders Below

The Opinion of the Court of Appeals for the Seventh Circuit, affirming the District Court's judgment, is set out as App. A. The Opinion is reported at 965 F.2d 238.

Jurisdictional Statement

On May 29, 1992, the Court of Appeals filed its Opinion (App. A) affirming the judgment of the District Court. No petition for rehearing was filed.

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under 28 U.S.C. Sec. 1257(a) and Rules 10.1, 12.1 and 13.1 of this Court.

Constitutional Provisions

The Fifth Amendment to the U.S. Constitution provides, in pertinent part:

> "No person shall ... be deprived of life, liberty or property, without due process of law; ..."

The Sixth Amendment to the U.S. Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Defendant and co-defendant, Grenados, were jointly charged with attempted extortion and conspiracy, under the Hobbs Act, 18 U.S.C. 1951. The somewhat unusual facts--involving a charge of journalistic blackmail, (App. 2)--are set out in the Court of Appeals Opinion, App. 2-3).[1]

Defendant was tried and convicted for violation of 18 U.S.C. 1951 on Count 1 of Ind. No. 90-CR-267-1, and sentened to 4 months under the Federal Sentencing Guidelines. [Co-defendant, Gilberto Lopez Grenados, tried with defendant and convicted on two counts, did not appeal, as he became and remains a fugitive.]

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1. As the interesting details are not essential to resolution of the issues presented in this Petition, they are not set out herein.

Prior to trial, the court conducted a truncated inquiry as to defendant's understanding with respect to proceeding with joint counsel despite the potential conflict of interest. This was triggered by the **prosecution** making a Motion to disqualify sole counsel from representing both defendants. (D.C. 6; A. 3) As is set out in the Court of Appeals Opinion, (App. 4-6), there was a conflict due to the nature of the evidence as to defendant as compared to co-defendant. The government (by making the Motion), the court, and the jury by its finding defendant guilty only of conspiracy, rather than conspiracy and attempt (as the co-defendant), all agreed there was a conflict.

After conviction but before sentencing, and after the 7-day time-

period had passed within which a Motion for New Trial could be timely filed (pursuant to F.R.Cr.P. 33) substitute (present, and appeal) counsel sought an evidentiary hearing as to whether defendant's waiver of the conflict due to joint representation was a valid waiver, and whether trial counsel rendered effective assistance. Through an offer of proof, defendant offered to testify to facts substantiating that, if separately represented, his defense would have been directly antagonistic to that of co-defendant. (R. 58) He also offered to testify that he did not speak good English, and did not understand what occurred at the waiver hearing, and he merely answered "Yes" after co-defendant did, because he was told to do so by defense counsel. The District Court

denied a hearing on the basis that the request came too late, because the 7-day time-period of Rule 33, for filing a motion for new trial (on grounds other than newly-discovered evidence), was jurisdictional.

The Court of Appeals, recognizing the conflict, (App. 5-6) and the lack of probing questions to defendant at the alleged waiver, (App. 6-7) and that only by a full hearing could it be ascertained if there had been a knowing waiver of conflict-free counsel, (App. 7-8), nonetheless affirmed, even though a timely motion for new trial (albeit not asserting the conflict or ineffective assistance issues) had been filed by original trial counsel, because the second motion was filed after 7 days of the finding of guilt.

REASONS FOR GRANTING CERTIORARI

1.

Defendant's constitutional right to effective assistance of counsel, Amendment VI, Constitution of the United States, has supremecy over a rule of procedure, 18 U.S.C. F.R.Cr.P. Sec. 33, so that where a defendant files a second motion for new trial--prior to the court's acting on the original motion and/or upon sentencing the defendant--and the new motion is by new counsel who asserts that prior counsel (both trial counsel and counsel in the original motion for new trial) rendered ineffective assistance because he did not raise the issue of his own ineffectiveness, the trial court, in order to preserve the defendant's constitutional right to effective assistance of counsel and in the interests of judicial economy, should hear evidence on that issue, even though the second motion for new trial was filed past the seven day limitation period set out in Rule 33.

There existed between the defendant and the co-defendant a conflict of interest that would prevent a single counsel from rendering effective assistance of counsel to both. The government so asserted in a pre-trial

motion requesting that counsel not represent both; and the United States Court of Appeals so found. The court stated:

> "We have undertaken this little excursus into the law of blackmail to make clear that the line of defense which the defendants' trial counsel proposed was indeed a non-starter. Maybe it seemed to have some potential before the government's witnesses testified, though that seems unlikely; in any event it was a flop at trial. With the benefit of hindsight, therefore, we can see that the defendants had nothing to gain from joint representation and something to gain from separate representation and mutual finger-pointing. Castillo in particular would have had a shot at persuading the jury that he had been just an innocent errand boy, trying in good faith to broker a dispute between two of his friends and unknowing of the scheme of blackmail that lay behind it. The light sentence that he received is some evidence that the judge thought him an almost innocent errand boy. Maybe with separate representation Castillo could

> have mounted the next step and won acquittal. Alternatively, a lawyer working just for him might have brokered a plea agreement by which in exchange for a lighter sentence Castillo would have agreed to testify against Grenados." (App. 5-6)

Prior to trial, there was a waiver--which defendant, by new counsel, asserted was an insufficient waiver--of the conflict. He asserted first that his lack of English caused him not to fully comprehend what was occurring, and second, that he was misled by trial counsel into acquiescing into the trial proceeding with only one lawyer. After conviction and after obtaining new counsel,[2] he filed a motion for new trial, asserting that the waiver was insufficient in that he was denied

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2. The same as present, undersigned counsel.

effective assistance of counsel both at trial and at the motion for new trial stage, because counsel misled him. The trial court would not consider this second issue because this motion for new trial was not filed within seven days of when the jury returned the verdict.

The Court of Appeals--although agreeing with defendant that the conflict could have denied him effective assistance of counsel and agreeing that there might exist evidence that would demonstrate that the waiver of conflict-free counsel was not knowing (App. 7-8)--agreed with the District Court that the seven-day rule bars the District Court from considering the issues that must be resolved, and that any ineffectiveness of original counsel in not including this in the motion for new trial is immaterial.

The decision of the court in this case is in direct conflict with cases holding that where the defendant is denied effective assistance of counsel relative to the filing of an appeal, the rule that requires the appeal to be properly filed within a prescribed time must be subservient to defendant's constitutional right to effective assistance of counsel; and where strict application of the procedural rule would deny the defendant his right to counsel, the rule must bend.

A defendant has the right to effective assistance of counsel, not only at trial but also in post-trial motions and on appeal. United States ex rel. Thomas v. O'Leary, 856 F.2d 1011 (7 Cir. 1988). It is a denial of due process and of defendant's Sixth Amendment constitutional right to counsel for

counsel to fail to file a timely, non-discretionary appeal or motion for new trial. Cf. Wainwright v. Toroner, 455 U.S. 586, 71 L.Ed.2d 475 (1982). A defendant is denied effective assistance of counsel when counsel fails to raise, in a motion for new trial, matters that are patently in violation of the defendant's constitutional rights. Crow v. Sowders, 864 F.2d 430 (6 Cir. 1989); People v. Taylor, 66 Ill.App.3d 907, 384 N.E.2d 558, 23 Ill.Dec. 764 (3 Dist. 1978). Where counsel fails to properly file a notice of appeal, an out of time appeal must be allowed. Mack v. Smith, 659 F.2d 23 (5 Cir. 1981), and cases cited therein; Hollis v. United States, 687 F.2d 257 (8 Cir. 1982).

Hence, where it is demonstrated that trial counsel who rendered ineffective

assistance of counsel at trial also filed a motion for new trial and failed to raise his own deficient performance, defendant's right to effective assistance of counsel should prevail and permit the filing of a late motion for new trial, raising the issue that defendant was denied effective assistance of counsel at trial.

Here, defendant was denied effective assistance of counsel at the motion for new trial.

Where the issue is whether trial counsel rendered effective assistance, there is a conflict between trial counsel and the defendant. United States v. Hurt, 543 F.2d 162 (D.C. Cir. 1976). It is inappropriate for a lawyer to represent the defendant in a post-trial hearing where an issue is whether that

lawyer rendered ineffective assistance. United States v. Ellison, 798 F.2d 1102 (7 Cir. 1986); People v. Jackson, 131 Ill.App.3d 128, 474 N.E.2d 466, 85 Ill.Dec. 738 (4 Dist. 1985).

The Opinion of the Court of Appeals:

> "There is no way around the command of Rule 33 of the Federal Rules of Criminal Procedure that a motion for new trial must be made within seven days of a guilty verdict unless based on newly discovered evidence." (App. 8),

is erroneous. Surely, where a lawyer is supposed to file a motion for new trial and fails to, due to ineffective assistance of counsel, defendant would not be barred from filing such a motion, just as he cannot be barred from proceeding with an appeal when the lawyer fails to proceed with the appeal as he is required to.

In Shockey v. Illinois, 375 U.S. 22, 11 L.Ed.2d 43 (1963), this Court granted certiorari, vacated the judgment of the Illinois Supreme Court and remanded the matter back to the Supreme Court of Illinois. The cause was before this Court on certiorari from People v. Shockey, 25 Ill.2d 528, 185 N.E.2d 893 (1962). There, the Illinois Supreme Court held that the appeal was barred because the transcript was not filed as necessary within the time prescribed by State statute. The State court rejected the argument that the transcript was not filed and prepared due to the indigency of the defendant. Implicit in the holding of this Court is the adoption of the dissenting opinion of Justice Schaefer in People v. Shockey, supra, 185 N.E.2d at 896, concluding that where the

failure to properly proceed with the appeal was due to inaction of appointed counsel, the violation of the time limit ban must be excused in order to insure that there was not a denial of defendant's right to effective assistance of counsel.

The situation at bar is analogous to when, due to denial of effective assistance of counsel, defendant's notice of appeal is not timely filed. In such case, where the lack of timely filing was due to denial of effective assistance of counsel, his right to appeal must be reinstated. Rodriquez v. United States, 395 U.S. 327, 23 L.Ed.2d 340 (1969). In Rodriquez, supra:

> "[P]etitioner's counsel did not submit a notice of appeal within the 10-day period specified"

by the then-applicable rule, Federal Rule of Criminal Procedure 37(a) (which had been superseded by F.R.App.P. 4(b). 395 U.S. at 328 n.1, 23 L.Ed.2d 343 n.1). This Court held that it was not necessary [as the Court of Appeals had held, United States v. Rodriquez, 387 F.2d 117 (9 Cir. 1967)], to meet the heaviest standard and prove violation of defendant's constitutional rights through a 28 U.S.C. 2255 Petition; but instead, because the notice was not timely filed due to ineffective assistance, this Court remanded the cause for appointment of counsel and to permit defendant to proceed with a direct appeal. Accord, Bell v. Lockhart, 795 F.2d 655 (8 Cir. 1986) (where defendant "lost his direct appeal due to his attorney's unprofessional error," this in itself is

sufficient to require institution of a direct appeal). See also Lozada v. Deeds, 498 U.S. ___, 112 L.Ed.2d 956 (1991), holding in essence that where defendant failed to proceed with a State appeal due to ineffective assistance of counsel who did not inform him concerning his rights to appeal, or to perfect his appeal demonstrates a substantial showing of the denial of his federally guaranteed right to counsel sufficient to require the grant of a certificate of probable cause to determine the issue of prejudice.[3] So too, here, defendant's right to effective assistance must

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3. In Lozada, this Court noted that "at least two Courts of Appeals have presumed prejudice in this situation," 112 L.Ed.2d at 961, citing Abels v. Kaiser, 913 F.2d 821, 823 (10 Cir. 1990), and Estes v. United States, 883 F.2d 645 (8 Cir. 1989), and also citing Rodriquez v. United States, supra, 395 U.S. at 330, discussed at pp. 18-19, supra.

prevail, and defendant must be permitted to file a late motion for new trial where, as here, no harm could occur to the government, because the late motion was filed prior to the hearing date on the original motion for new trial.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 91-1288

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SERAFIN CASTILLO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 CR 267—**Charles R. Norgle, Sr.**, *Judge.*

ARGUED JANUARY 8, 1992—DECIDED MAY 29, 1992

Before CUMMINGS, POSNER, and RIPPLE, *Circuit Judges.*

POSNER, *Circuit Judge.* Serafin Castillo was convicted by a jury of conspiracy to commit extortion, in violation of 18 U.S.C. § 1951, and sentenced to four months in prison. Three months after being convicted, but before being sentenced, Castillo through a newly retained lawyer moved for a new trial, contending that his trial lawyer had failed to represent him effectively. The judge denied the motion as untimely. Castillo appeals both from the judgment of conviction, on the ground of ineffective assistance of counsel, and from the denial of the motion for a new trial, on the ground that such a motion even when untimely may be granted if the basis for the motion is ineffective assistance.

Castillo was punished for his participation in a case of journalistic blackmail. Gilberto Lopez Grenados, who was tried together with Castillo and convicted but who fled before being sentenced and remains a fugitive, published a Spanish-language newspaper in Chicago called *Tribuna de America*. One of his competitors was Socorro Grajeda, the publisher of *El Pueblo* (for which Grenados had once worked). Grajeda also was president of MEDA (Mexicanos de Afuera—expatriate Mexicans), a service organization of the Mexican-American community of Chicago. Grenados published a series of articles in *Tribuna* that were (to say the least) highly critical of Grajeda. They charged that MEDA was defrauding the community, that the food it distributed to the poor was "waste from warehouses," and that Grajeda had low morals and by participating in MEDA was "behaving like a vulgar market woman." Disturbed and embarrassed, Grajeda would whenever she encountered Grenados plead with him to stop publishing the articles. He said he wouldn't stop until he had destroyed both her and MEDA.

After this had gone on for some time Grenados telephoned Grajeda and told her that if she paid him, he would stop publishing the articles critical of her. She said that she couldn't afford to pay him. Enter Castillo, an acquaintance of both Grenados and Grajeda, who owned a grocery store in the same neighborhood where *Tribuna* and *El Pueblo* were published. Shortly after the telephone conversation, Castillo began visiting and phoning Grajeda. Though always polite and cordial, he kept asking her where the money was that Grenados wanted and he told her, though Grenados had never named a sum to her, that Grenados wanted $26,000. He warned her that if she didn't pay, Grenados wouldn't stop the stream of articles criticizing her; at the same time he reassured her that if she did pay, Grenados would stop—indeed, he, Castillo, would see that he stopped.

Grajeda confided in a business associate, who called the FBI, who recorded the next phone call by Castillo to Grajeda. In it he told her that Grenados wanted to meet her

the next day to arrange about the payment of the $26,000. She asked him to put Grenados on the phone. Castillo demurred, but shortly afterward showed up in person at Grajeda's office and told her that Grenados would talk to her but that she would have to call him from a pay phone because Grenados feared she might be planning to record the call. Accompanied by Castillo and by an undercover FBI agent who was posing as a friend of hers, Grajeda crossed the street to a pay phone. Castillo dialed a number and handed the phone to Grajeda. Grenados was on the other end. Grajeda told him that she would pay, but she wanted a written promise that if she paid the articles would stop. Grenados replied that she would have to arrange it with Castillo. Afterwards Grajeda asked Castillo why he had gotten involved in the matter and he said that he wanted to see the articles stopped and that he might be compensated by Grenados if things worked out; Grenados owed him $5,000. Castillo then invited her to a meeting the next day with Grenados at the grocery store that Castillo owned.

The meeting came off as scheduled. Grajeda in the presence of the two men handed Grenados a bag of (marked) money. At first he wouldn't take it and told her to hand it to Castillo, but she urged him to take it and eventually he did. Grenados refused to furnish a written promise to stop publishing the articles but he did give her a receipt for the money. The two men were then arrested.

Grenados and Castillo had the same lawyer at trial, and this is the basis of Castillo's first ground of appeal. Before trial the prosecutor asked the judge to conduct, pursuant to Fed. R. Crim. P. 44(c), an inquiry to determine whether joint representation might create a conflict of interest. In response, the lawyer for the two defendants submitted a statement, signed by both, saying that they wanted to be represented by this lawyer and that he had discussed with them in detail the potential conflict of interest posed by the arrangement. The district judge held a brief inquest at which the prosecutor moved to disqualify the law-

yer from representing more than one of the defendants and the defendants' lawyer repeated that he had discussed the potential conflict of interest with his clients and had concluded that there was none. There was none because the defense that they had decided to present was that the negotiations culminating in the cash payment constituted a legitimate rather than an extortionate business transaction: the $26,000 was to buy Grenados's newspaper, Grajeda having decided that that was the only way she could stop the flow of defamatory articles about her.

After receiving some further submissions from the prosecutor and the defense lawyer and engaging in some give and take with them, the judge turned to the defendants and asked them seven questions. The first was, "Did you hear what Mr. Aronson [the defense lawyer] just said?" The last was, "You both want Mr. Aronson to represent you?" The defendants answered "Yes" to all the questions, without elaboration, whereupon the judge denied the prosecutor's motion to disqualify Aronson from representing both.

No issue was raised at that time concerning the defendants' competence in the English language, but it was raised later and the judge decided to assign an interpreter to Castillo for the trial. At the trial, the government presented the evidence that we summarized above. The defense put on only a single witness—a character witness.

If the best defense had indeed been to depict the negotiations as a legitimate business transaction, then joint representation would have been a defensible tactical choice, as otherwise each defendant might be placed in the position of arguing both that the transaction was legitimate and that it was the other defendant who was to blame—a form of alternative pleading that might not impress a jury. If on the other hand mutual finger-pointing was the best defense—Grenados arguing that it was not he but Castillo who had handled the negotiations and Castillo arguing that he was just an errand boy for Grenados and didn't know the transaction was not on the up and up—then separate representation was indicated.

As the evidence unfolded at trial, it became clear that the first line of defense was hopeless. The "transaction" was not the sale of a business. It was blackmail, a standard form of extortion. *United States v. Nardello*, 393 U.S. 286 (1969). Grenados told Grajeda that for a price he would stop publishing discreditable things about her. He thus was selling silence. Whether the discreditable things were true or false is irrelevant. Granted, blackmail with false information is less likely to succeed than if the information were true, because the victim has a potential remedy by way of defamation (as he would not, of course, if the information were true), and is therefore less likely to pay. He may also fear that by paying he will be making the false information more credible and thus harder to disprove later—or even be inviting the blackmailer to return with a new demand, since the more credible the dirt the higher the price for burying it. Still, there are occasional cases of blackmail with false dirt—enough of them that we know that this form of blackmail is just as criminal as the more common kind. *United States v. Schwartz*, 398 F.2d 464, 466 (7th Cir. 1968); *People v. Camodeca*, 52 Cal. 2d 142, 338 P.2d 903 (1959); *State v. McNellis*, 25 Conn. Supp. 5, 195 A.2d 572 (Super. Ct. 1963) (per curiam); *Roberts v. United States*, 248 Fed. 873, 877 (9th Cir. 1918). Had Grajeda taken the initiative in seeking to exchange money for forbearance to publish, this would not be a blackmail case. It is a grave violation of journalistic ethics, but it is not blackmail (or extortion), passively to accept an offer of payment in exchange for silence. *United States v. Holzer*, 816 F.2d 304, 310-11 (7th Cir.), remanded for reconsideration on other grounds, 484 U.S. 807 (1987), on remand, 840 F.2d 1343, 1351 (7th Cir. 1988); James Lindgren, "Blackmail: On Waste, Morals, and Ronald Coase," 36 *UCLA L. Rev.* 597, 606 and n. 34 (1989). But it was Grenados who took the initiative.

We have undertaken this little excursus into the law of blackmail to make clear that the line of defense which the defendants' trial counsel proposed was indeed a nonstarter. Maybe it seemed to have some potential before

the government's witnesses testified, though that seems unlikely; in any event it was a flop at trial. With the benefit of hindsight, therefore, we can see that the defendants had nothing to gain from joint representation and something to gain from separate representation and mutual finger-pointing. Castillo in particular would have had a shot at persuading the jury that he had been just an innocent errand boy, trying in good faith to broker a dispute between two of his friends and unknowing of the scheme of blackmail that lay behind it. The light sentence that he received is some evidence that the judge thought him an almost innocent errand boy. Maybe with separate representation Castillo could have mounted the next step and won acquittal. Alternatively, a lawyer working just for him might have brokered a plea agreement by which in exchange for a lighter sentence Castillo would have agreed to testify against Grenados.

But all this is by way of hindsight. If the defendants made an effective waiver of their right to separate representation, the fact that ex post their decision turned out to be mistaken would no more entitle them to a new trial than a parallel disappointment in an ordinary contract case would entitle the disappointed party to rescind the contract. *United States v. Roth*, 860 F.2d 1382, 1388-89 (7th Cir. 1988); *United States v. Krebs*, 788 F.2d 1166, 1173 (6th Cir. 1986). "Waiver" in law *means* that you give up something of potential value to you. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). So we must consider whether there was an effective waiver. On the record before us, the answer is yes. The lawyer had a strategy, ill-conceived as it may in retrospect appear to have been, that if followed would have eliminated any conflict of interest that joint representation might otherwise have presented. The lawyer represented to the court without contradiction that he had explained the strategy to the defendants, that he had also explained to them the risk of joint representation, and that they had decided they wanted him to represent them both. The government objected, but that could

not be decisive; the government is not allowed to prescribe defense strategy or to thwart joint representation when it might be in the interests of the defendants. *Wheat v. United States*, 486 U.S. 153 (1988), holds that the judge can, not that he must, disregard a defendant's waiver of his right to be represented by a lawyer who does not have a conflict of interest.

Admittedly the series of questions that the judge put to the defendants in an effort to verify that the lawyer had accurately represented their discussions fell far short of a probing inquest. And because consistency required the defendants only to say "yes" to each question, there was a danger that they were reciting mechanically without actually understanding the questions. It would have been better if the judge had injected at least one "no" question, such as whether the defendants would prefer to have separate lawyers; if they had said "yes" he would have known something was wrong. It might have been better still if instead of inviting monosyllabic responses he had tried to elicit a narrative response, as in *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975), though we have held that this procedure is not mandatory. *United States v. Bradshaw*, 719 F.2d 907, 914 (7th Cir. 1983). To insist on it in every case would be to confuse a knowing waiver with an articulate one. A defendant may have a strong and informed preference for joint representation yet, lacking training in law or experience in public speaking, be unable to articulate the grounds for it intelligibly.

We are given some pause by our uncertainty as to how well the defendants could understand English. Yet when it later developed that Castillo had a language problem, the government did not renew its motion for disqualification. And he may have had enough English to understand the judge's questions (we don't know whether Aronson spoke to his clients in English or Spanish) without having enough to be comfortable listening to a complete trial conducted in English.

We cannot without more pronounce Castillo's waiver unknowing, but of course a fuller record might have dis-

closed a more compelling case that it was. A hearing at which Castillo and Aronson testified might reveal that not only the judge but also the lawyer had spoken to Castillo only in English, that Castillo's English really was too poor for him to have understood either one, or even that Aronson had never explained the pros and cons of joint representation either generally or in the context of this case. A hearing might show that Aronson had been incompetent in advising his clients to follow a strategy, that of depicting the "transaction" as legitimate, that eliminated the conflict of interest otherwise latent in joint representation of defendants of unequal guilt.

It was in recognition of the need to make a record in order to present a convincing case of unknowing waiver that Castillo's new lawyer moved for a new trial and requested that an evidentiary hearing on the motion. But there is no way around the command of Rule 33 of the Federal Rules of Criminal Procedure that a motion for a new trial be made within seven days of the guilty verdict unless based on newly discovered evidence. The motion was based not on any newly discovered evidence, but on what is not an adequate substitute—hope that an evidentiary hearing might develop some new evidence. *United States v. Mazzanti*, 925 F.2d 1026, 1031 (7th Cir. 1991); *United States v. Salerno*, 868 F.2d 524, 541 (2d Cir. 1989); *United States v. Pinkney*, 543 F.2d 908, 916 (D.C. Cir. 1976). It is not as if the defendants had discovered after trial that Aronson had actually been a paid agent of the prosecutor. That would be newly discovered evidence material to the effectiveness of their waiver of the right to separate representation. Cf. *United States v. Espinosa-Hernandez*, 918 F.2d 911 (11th Cir. 1990) (per curiam); *United States v. Kelly*, 790 F.2d 130, 138 (D.C. Cir. 1986). Nor do we mean to suggest that the motion itself must establish the movant's entitlement to judgment. The evidence tendered with the motion need only establish "a high enough probability of error to warrant a hearing." *Amax Coal Co. v. Franklin*, 957 F.2d 355, 357 (7th Cir. 1992). No evidence was presented, however.

Castillo's lawyer argues that the only alternative to the (untimely) motion for a new trial was to wait and file a postconviction motion under 28 U.S.C. § 2255, which can be done only after the defendant has exhausted his appellate remedies; and he should not have to wait that long to raise the issue of ineffective assistance of counsel. Well, he didn't wait that long. He has argued that we should reverse his conviction on the basis of the unsupplemented trial record, and we have rejected the argument on the merits. *United States v. Taglia*, 922 F.2d 413, 417-19 (7th Cir. 1991). Normally of course an issue that was not and could not have been raised at trial cannot be raised on appeal, although if it is a criminal case it can be raised in a postconviction proceeding. And that is the character of a complaint about trial counsel's performance—*he* isn't going to raise it at trial; he didn't here, of course. However, courts have made an exception to the rule that an issue not raised at trial can't be raised on appeal. They allow an appellant to argue the ineffectiveness of his trial counsel provided that he is willing to base his argument on the trial record—for obviously the appellate court isn't going to compile a further record. For illustrative decisions (besides *Taglia*) see *United States v. Pinkney*, *supra*, 543 F.2d at 915; *United States v. Hallock*, 941 F.2d 36, 43 (1st Cir. 1991); *United States v. Matos*, 905 F.2d 30, 32 (2d Cir. 1990); *United States v. Tatum*, 943 F.2d 370, 380 (4th Cir. 1991); *United States v. Bounds*, 943 F.2d 541, 544 (5th Cir. 1991); *United States v. Wunder*, 919 F.2d 34, 37 (6th Cir. 1990) (per curiam); *United States v. Kindle*, 925 F.2d 272, 276 (8th Cir. 1991); *United States v. Swanson*, 943 F.2d 1070, 1072 (9th Cir. 1991); *Beaulieu v. United States*, 930 F.2d 805, 806-07 (10th Cir. 1991). The Eleventh and possibly the Third Circuit used to think the better practice was to postpone all such challenges to the postconviction stage by refusing to waive the normal rule against raising new issues for the first time on appeal. *United States v. Khoury*, 901 F.2d 948, 969 (11th Cir. 1990); *United States v. Arango*, 853 F.2d 818, 823 (11th Cir. 1988); *United States v. Sandini*, 888 F.2d 300, 312 (3d Cir. 1989). But they have receded from this position

and joined the majority. *United States v. Hamblin*, 911 F.2d 551, 556 (11th Cir. 1990); *United States v. Headley*, 923 F.2d 1079, 1083 (3d Cir. 1991). Rejoined, in the case of the Third Circuit. See *Government of Virgin Islands v. Zepp*, 748 F.2d 125, 133 (3d Cir. 1984). There is no longer a conflict between circuits on the issue.

This case is not within the exception, however. The trial record—all an appellant can go on who didn't raise the conflict of interest point in the district court by filing a motion for a new trial—discloses merely a *potential* conflict of interest, and if the defendants waived any objection to it knowingly and intelligently there was no denial of their right to effective representation. So far as appears from the trial record the waiver *was* knowing and intelligent. To prevail therefore Castillo must present more evidence. He could not do that by means of an untimely motion for a new trial. He could have done it by filing a timely motion for a new trial, as suggested in *Taglia*, or initiating a postconviction proceeding after he exhausted his appellate remedies. It is premature to decide whether by raising the issue now he has waived his right to raise it in a postconviction proceeding.

The only other challenge to the judgment of the district court is that the prosecutor commented on Castillo's failure to take the stand, thus penalizing Castillo's right not to be forced to incriminate himself. (The penalty, if that is what it should be called, was slight, because juries are perfectly capable of drawing an adverse inference from a defendant's refusal to testify on their own without having to be asked to do so. *United States v. Garguilo*, 310 F.2d 249, 252 (2d Cir. 1962) (Friendly, J.).) There was no direct such comment. All the prosecutor said was that no evidence had been presented that supported the defendants' defense, which as we know is that the transaction between them and Grajeda was a legitimate business transaction rather than blackmail. This is a proper comment. *United States v. Martinez*, 937 F.2d 299, 310-11 (7th Cir. 1991). It is not equivalent to telling the jury that the defendants must be guilty because an innocent person would have

testified. It might be equivalent if the only way a defendant could present evidence was by testifying. But defendants are not the only potential defense witnesses. Indeed, criminal defendants often rely on the government's witnesses to establish the essential elements of the defense. All the prosecutor was saying was that, with the trial complete, there was no evidence to support the defense lawyer's argument that his clients had been engaged in a legitimate transaction. He was commenting on the balance of the evidence, not about the exercise by the defendants of their constitutional rights.

The cases say, it is true, that if it is highly unlikely that anyone other than the defendant could rebut the prosecutor's case, a comment on the absence of evidence in support of the *defense* case will be understood by the jury as a comment on the *defendant's* failure to take the stand and is therefore forbidden. *Freeman v. Lane*, No. 90-2480, slip op. at 13-15 (7th Cir. May 1, 1992); *United States v. DiCaro*, 852 F.2d 259, 263 (7th Cir. 1988); *United States ex rel. Burke v. Greer*, 756 F.2d 1295, 1300-01 (7th Cir. 1985); *United States v. Buege*, 578 F.2d 187 (7th Cir. 1978); *United States v. Fearns*, 501 F.2d 486, 490 (7th Cir. 1974); *United States v. Norton*, 867 F.2d 1354, 1364 (11th Cir. 1989); *United States v. Guzman*, 781 F.2d 428, 432 (5th Cir. 1986) (per curiam). This might appear to be such a case; only the defendants could have contradicted Grajeda's version of the transaction which they contend was a legitimate business deal. But we understand the cases to require more than just a logical connection between the prosecutor's comments and the defendant's failure to take the stand. For then in every case in which the only possible defense witness was the defendant himself and he had failed to take the stand, the prosecutor would be prevented from pointing out to the jury that the evidence one-sidedly favored the prosecution. So there must be some basis for an inference that the prosecutor's remarks were in fact (or would be understood as) directed at the defendant's failure to take the stand, viewed as evidence of guilt. Hence our reference in *Freeman v. Lane, supra*, slip op.

at 17, to the prosecutor's "strong, repeated references" as constituting "studied rhetoric" and "pointed comment" on the defendant's failure to testify, and in *United States ex rel. Burke v. Greer*, *supra*, 756 F.2d at 1300 (quoting *United States v. Lyons*, 397 F.2d 505, 509 (7th Cir. 1968)), to remarks that a jury would "naturally and necessarily take to be a comment on the defendant's failure to testify." There is nothing of that sort here.

AFFIRMED.

RIPPLE, *Circuit Judge*, concurring. I concur in the judgment of the court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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